

**ONE YEAR ISN'T ENOUGH:
HOW THE HAGUE ABDUCTION CONVENTION'S ONE-YEAR LIMITATION
ENCOURAGES ABDUCTORS TO CONCEAL THEIR CHILD'S WHEREABOUTS**

ABSTRACT

This essay examines the Hague Convention on International Child Abduction, specifically analyzing the one-year limitation period in which a left-behind parent must commence court proceedings in order to attain the immediate return of their abducted child. This essay argues that a child should not be considered well-settled when an abducting parent hides the whereabouts of the child from the left-behind parent for over a year, or purposely thwarts the parent's ability to begin proceedings within a year. This essay concludes that tolling the one-year limitation would better preserve the best interests of the child and the objectives of the convention, which should be addressed via an interpretive statement made by the Convention members.

I. INTRODUCTION

One morning in November 2008, Diana Montoya Alvarez left her London home to take her three-year-old daughter to nursery school, and never returned.¹ Diana abducted her daughter and absconded to France without informing her daughter's father, Manuel Jose Lozano.² She and her daughter ultimately settled in New York City, never informing Manuel of their whereabouts.³ A worried Manuel diligently searched for Diana and his daughter, exhausting all of his resources in the United Kingdom, but was still unable to locate them.⁴ He then reached out to government agencies in other countries, finally discovering his daughter's whereabouts with the assistance of a private investigator, pro bono counsel, and the U.S. Department of State.⁵ Manuel filed a petition and court proceedings for the return of his daughter to England, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction

¹ Lozano v. Montoya Alvarez, 572 U.S. ___, slip op. at 4 (2014) [hereinafter "Lozano III"].

² *Id.*

³ *Id.* at 4; Both Manuel and Diana made very different accounts of their relationship; Manuel claimed they were happy and normal, and Diana claimed the relationship was abusive and controlling, although the court found Diana's credibility and truthfulness questionable. See *In Re Lozano*, 809 F.Supp.2d 197, 205-16 (S.D.N.Y. 2011).

⁴ Lozano III, 572 U.S. ___, slip op. at 4.

⁵ Jeremy Garcia, *The Unsettling Effects of Immigration Status in International Child Abduction Cases*, 33 IMMIGR. & NAT'LITY L. REV. 469, 472 (2012) [hereinafter "Garcia *Unsettling Effects*"]

(hereinafter “Hague Convention,” or “Convention”),⁶ more than two years after his daughter had been abducted,⁷ as Manuel could not begin proceedings until his daughter was located.⁸

Although Diana purposely concealed the whereabouts of their daughter from Manuel, the Court did not order her return to England due to an exception under the Convention: more than one year had passed since her abduction, and the child was deemed “well settled” in her new environment.⁹ The Court declined to apply the theory of “equitable tolling,” which would pause running the one-year period until the child’s whereabouts were discovered, because the Convention’s language did not expressly allow it.¹⁰ Due to this ruling, Manuel has no recourse for the return of his daughter, who now legally resides in the U.S. without her father.¹¹

II. THE HISTORY, INTERPRETATION AND APPLICATION OF THE HAGUE CONVENTION AND TOLLING

A. The History and Purpose of the Hague Convention

Parental child abduction began to rise in the 1970s when international mobility became more prevalent, marriages between couples from different countries increased,¹² and divorce rates began to rise.¹³ Parental child abduction continues to be a serious problem today, claiming over 203,900 victims in the United States alone each year.¹⁴ To combat this problem,

⁶ Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter “Hague Convention”].

⁷ Lozano III, 572 U.S. ___, slip op. at 6.

⁸ See GUIDANCE ON COMPLETING THE HAGUE APPLICATION FORM, U.S. STATE DEPARTMENT BUREAU OF CONSULAR AFFAIRS, available at <http://travel.state.gov/content/childabduction/english/from/hague-app/guidance.html> (filing an incomplete application form is not permitted).

⁹ *Id.* at 6.

¹⁰ *Id.* at 4.

¹¹ Lozano v. Montoya Alvarez, 697 F.3d 41, 43 (2d Cir. 2002).

¹² RHONA SCHUZ, THE HAGUE CHILD ABDUCTION CONVENTION: A CRITICAL ANALYSIS 1 (2013) [hereinafter, SCHUZ, A CRITICAL ANALYSIS].

¹³ Nancy Faulkner, The Impact of Parental Child Abduction, Presentation for the United Nations Convention on Child Rights (June 9, 1999), available at <http://www.healthyplace.com/abuse/articles/the-impact-of-parental-child-abduction/print/>.

¹⁴ Robert J. Flores, *NISMART – Children Abducted by Family Members: National Estimates and Characteristics*, U.S. DEPT. OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION at 2 (2002) (these are the most recent figures available).

in 1980, the Hague Convention was signed into force.¹⁵

The Hague Convention is a multilateral treaty which seeks to protect children from the harmful effects of abduction across international boundaries by providing a procedure to bring about the immediate and automatic return of a child wrongfully removed from a country and taken to a contracting country, as long as a petition for return has been filed and proceedings have begun within one year from the abduction.¹⁶ If judicial or administrative proceedings have not commenced within one year of abduction, return of the child to the left-behind parent is no longer automatic if the court finds the child well-settled in its new environment.¹⁷ Where a child is found to be well-settled, the left-behind parent has no further recourse in the left-behind country.¹⁸ The child remains in the custody of the abducting parent, and there is typically no additional determination made regarding parental custody on the merits.¹⁹

The objective of the Convention is to secure the prompt return of children under sixteen years of age that have been “wrongfully removed to, or retained in, any Contracting State” and to “ensure that the rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting States.”²⁰ The intent of the Convention is to preserve the status quo custody arrangement in the child’s place of habitual residence that existed immediately before the abduction, and to deter parents from crossing international borders in search of a more sympathetic court.²¹

¹⁵ HCCH, MEMBERS OF THE ORGANIZATION, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> (last visited April 27, 2016); There are currently ninety-four signatories to the Convention, with the Philippines signing in 2016, Japan and Iraq in 2014, and Zambia in 2013.

¹⁶ Hague Convention art. 12.

¹⁷ *Id.*

¹⁸ SCHUZ, A CRITICAL ANALYSIS, *supra* note 12 at 231.

¹⁹ *Id.*

²⁰ Hague Convention art. 1.

²¹ Chris Brady & David Steefel, *The Hague Convention on the Civil Aspects of International Child Abduction*, 41 COLO. LAW. 25, 25, 2012 [hereinafter Brady, *The Hague Convention*]; Eliza Perez-Vera, *Explanatory Report: Hague Conference on Private International Law*, 3 ACTS & DOCUMENTS FOURTEENTH SESSION 426, 429 (1981) [hereinafter, Perez-Vera Report].

The focus of the court's inquiry in a Hague Convention case is not "the best interests of the child," but rather the specific claims and defenses allowable under the Convention.²² Namely, whether a child has been wrongfully removed to, or retained in, a country other than that of the child's habitual residence, and if so, if any of the Convention's defenses apply to bar the child's return.²³ However, the reasoning for the well-settled defense is founded on the belief that the best interests of the child are best served by keeping the child in his or her abducted environment rather than uprooting the child once again.²⁴

Currently, the U.S. Supreme Court is the only high court of the ninety-four Contracting States that has answered the question regarding equitable tolling of the one-year limitation period when an abducting parent purposely conceals the child's location from the left-behind parent.²⁵ However, lower courts in other Contracting States have considered this question,²⁶ with some applying equitable tolling standards,²⁷ and others not.²⁸ Since no oversight body

²² In Re Lozano, 809 F. Supp. 2d. 197, 217 (S.D.N.Y. 2011), quoting Hazbun Escaf v. Rodriguez, 200 F. Supp. 2d. 603, 610-11 (E.D. Va. 2002).

²³ *Id.*

²⁴ See Nicole Fontaine, Note, *Don't Stop the Clock: Why Equitable Tolling Should Not Be Read Into the Hague Convention on International Child Abduction*, 54 B.C. L. Rev. 2091, 2094 (2013) [hereinafter Fontaine, *Don't Stop the Clock*].

²⁵ Lozano III, 572 U.S. ___, slip op. at 1, 10; HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, NEWS AND EVENTS ARCHIVE, http://www.hcch.net/index_en.php?act=events.listing (last visited Dec. 11, 2014).

²⁶ Merle H. Weiner, *Uprooting Children in the Name of Equity*, 33 FORDHAM INT'L L.J. 409, 409 (2009-2010); Furnes v. Reeves, 362 F.3d 702, 702 (11th Cir. 2004) (equitable tolling allowed); Cannon v. Cannon, [2004] EWCA (civ) 1330 [¶8], [2005] 1 FLR 169 (Eng.) (equitable tolling not allowed); H.J. v. Secretary for Justice [2006] NZ FLR 1005 (N.Z.) (equitable tolling not allowed).

²⁷ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, INCADAT, CASE LAW ANALYSIS, <http://www.incadat.com/index.cfm?act=search.detail&cid=125&lng=1&sl=2> (last visited Jan. 4, 2015); J.E.A. v. C.L.M. (2002), 220 D.L.R. 4th 577 (Can. N.S. C.A.) (where the court ordered return even though seven years had elapsed because the child was concealed by the abducting parent), Justice de Paix du cercle de Lausanne [Magistrate's Court] July 6, 2000, J 765 CIEV 112E (Switz.) (INCADAT cite: HC/E/CH 434) (where the court ordered the return of a child after four years because the child was concealed by the abducting parent), In re Coffield, 96 Ohio App. 3d 52, 644 N.E. 2d 662, 662 (1994) (where the court ordered return of a child after 3 years because the child was concealed by the abducting parent); Lops v. Lops, 140 F.3d 927, 927 (11th Cir. 1998) (where the court ordered return of a child after two years because the child was concealed by the abducting parent).

²⁸ See, e.g., CA 5690/10 A v. B (Family Matters) [2010] (Isr.) [INCADAT cite: HC/E/IL 1290] (where a child was abducted to Israel but was not located for two years; the court declined to apply equitable tolling and found the child well settled and did not order return). A left-behind parent must also prove that he or she was actually exercising custody rights at the time of abduction, meaning that the parent must have a legal right to custody

ensures compliance or enforcement of the Convention,²⁹ wide inconsistencies have resulted in an unclear standard.³⁰

B. The Hague Petition and Commencing Proceedings

Under the Convention, each Contracting State has a Central Authority to which petitions for an abducted child's return shall be delivered.³¹ In many countries, submitting an incomplete petition is not permitted, and a petition is generally not considered complete until the child is located.³² Many countries, including the United States, do not provide or possess the funding to locate an abducted child, help a left-behind parent obtain required documents, or provide legal aid,³³ leaving the left-behind parent with the sole duty to find their child within one year.³⁴ This creates a situation where a left-behind parent may not have the money or resources to begin proceedings until over one year has passed since the child's abduction.³⁵

C. Interpretation of the Well-Settled Exception to Immediate Return

Under the Convention, specific affirmative defenses are available to the abducting

or visitation in the child's country of habitual residence, and exercises this right by seeing his child. Hague Convention art 12.

²⁹ *Neulinger & Shuruk v. Switzerland*, 540 Eur. Ct. H.R. at 43 (2009).

³⁰ Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L L.J. 41, 61 (2003).

³¹ Hague Convention art. 6; *see, e.g.*, THE U.S. DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS: HOW TO FILE A HAGUE APPLICATION, available at <http://travel.state.gov/content/childabduction/english/from/hague-app.html>; THE CANADIAN EMBASSY, PARENTAL CHILD ABDUCTION, available at http://canada.usembassy.gov/consular_services/child-abduction.html#hague (explaining the certified documents required and that "cases will not be acted upon until the Central Authority receives all of the required documents"); THE UNITED KINGDOM, INTERNATIONAL CHILD ABDUCTION AND CONTACT UNIT APPLICATION FORM, available at <https://www.gov.uk/government/publications/international-child-abduction-and-contact-unit-application-form>.

³² *See, e.g.*, GUIDANCE ON COMPLETING THE HAGUE APPLICATION FORM, U.S. STATE DEPARTMENT BUREAU OF CONSULAR AFFAIRS, available at <http://travel.state.gov/content/childabduction/english/from/hague-app/guidance.html> (where filing an incomplete form is not permitted).

³³ *See, e.g.*, IRELAND DEPARTMENT OF JUSTICE AND EQUALITY, INTERNATIONAL CHILD ABDUCTION, http://www.justice.ie/en/JELR/Pages/Applying_for_the_return_of_a_child;

³⁴ Although the convention allows Contracting States to impose the costs of these fees upon the abducting parent, this is not mandatory and only takes place after the trial, meaning that the left-behind parent must obtain and pay the money on the front-end, and still may not recover for these expenses when the proceedings are finally over. Hague Convention art. 26.

³⁵ Chiancone, *Issues in Resolving International Child Abduction*, *infra* note 145 at 6-7.

parent, one of which includes what is known as “the well-settled exception,” which occurs when a petition is not filed within one year and a court finds the child well-settled in his or her new environment.³⁶ If a court finds a child well-settled, the court is no longer obliged to order the immediate return of the child to the left-behind parent, and may allow the child to stay with his or her abducting parent indefinitely.³⁷

Judicial systems in each Contracting State have discretion when interpreting the Convention,³⁸ which does not define “well-settled” or specify what factors should be considered to determine if a child is well-settled.³⁹ For this reason, this exception to is widely interpreted throughout the Contracting States, and a uniform interpretation has not emerged.⁴⁰ Depending on the court, a child may or may not be considered well-settled based on: ties to the new community,⁴¹ the chance of future disruption,⁴² immigration status,⁴³ the child’s preference,⁴⁴ prospective age,⁴⁵ or a totality of the circumstances.⁴⁶

The most troubling situation arises when a child cannot be located for over one year—entirely due to the abductor hiding the child—and the child is nevertheless found well-settled.

³⁶ Hague Convention art. 12-13. The two other exceptions or defenses are: grave risk of harm to the child, and the child’s objection to return. *Id.*

³⁷ *Id.* Many courts take the child’s objection and grave risk of harm into consideration when examining whether a child is well-settled. *See, e.g.,* Re M, [2007] UKHL 55, [2008] 1 AC 1288 (197) (Eng.) [INCADAT cite: HC/E/UK 937] (where the court considered the views of thirteen and ten year-old daughters when finding the children well-settled).

³⁸ Allison M. Scott, Note, *From a State-Centered Approach to Transnational Openness*, 11 IND. J. GLOBAL LEGAL STUD. 233, 235 (2004).

³⁹ Michael Singer, Note, *Across the Border and Back Again: Immigration Status and the Article 12 “Well-Settled” Defense*, 81 FORDHAM L. REV. 3693, 3693-96 (2012-2013); Garcia, *Unsettling Effects*, *supra* note 5 at 474.

⁴⁰ INCADAT Comments on State Central Authority v. Ayob [1997] FLC 92-746, 21 Fam. LR 567 (Austl.) [INCADAT cite: HC/E/AU 232], available at <http://www.incadat.com/index.cfm?act=search.detail&cid=232&lng=1&sl=2>.

⁴¹ *See, e.g.,* David S. v. Zamira S., 151 Misc.2d 630, 574 N.Y.S.2d 429, 429 (Fam. Ct. 1991).

⁴² *See, e.g.,* State Central Authority v. Ayob [1997] FLC 92-746, 21 Fam. LR 567 (Austl.) [INCADAT cite: HC/E/AU 232].

⁴³ *See, e.g.,* Bobadilla v. Cordero, No. 1:14-CV-205, 2014 WL 3869998 at *4 (M.D. N.C. Aug. 6, 2014).

⁴⁴ *See, e.g.,* Crnkovich v. Hortensius [2009] W.D.F.L. 337, 62 R.F.L. 6th 351 (Can.).

⁴⁵ *See, e.g.,* Oberster Gerichtshof [OGH] (Superior Appellate Court) May 17, 1990, docket No. 7 Ob 573/90 (Austria) [INCADAT cite: HC/E/AT 378].

⁴⁶ *See, e.g.,* J.E.A. v. C.L.M. (2002), 220 D.L.R. 4th 577 ¶ 55, 61-62 (Can. N.S. C.A.).

Although a small number of courts decline to find settlement where a child has been concealed,⁴⁷ this is not true of most courts. For instance, in *Re C.*, a case similar to *Lozano v. Montoya Alvarez*, a child was abducted by her mother in the United States and taken to England.⁴⁸ The child was not located until four years later, when she was found living in Liverpool under an assumed identity.⁴⁹ The mother's concealment paid off in a well-settled finding, even though the court held that her removal was wrongful.⁵⁰ When settlement is found, many courts hold that there is no discretion to order return,⁵¹ while other courts maintain their right to order return despite a well-settled finding.⁵²

The wide disparity between return rates in different Contracting States, ranging from 100% in Scotland, to 2% in Estonia, further demonstrates that there are enormous differences in the way the Convention is implemented among Contracting States.⁵³ Return is rarely prompt, as proceedings can range from 44 days in Denmark to 347 days in Bulgaria.⁵⁴ Since time is the initial concern when a court finds a child well-settled, it appears that the Convention is not meeting its objective of providing prompt return of abducted children to the country from which they were abducted.

i. Jurisdiction and Underlying Disputes

A court considering a Hague Convention petition has jurisdiction only over the

⁴⁷ See, e.g., *Cannon v. Cannon*, [2004] EWCA (civ) 1330 [¶8], [2005] 1 FLR 169 (Eng.) (where the mother abducted her daughter from the United States and took her to Nova Scotia. The child was not located for seven years. Even though the child was well-settled, the court ordered return because to hold otherwise would undermine the fundamental objectives of the Convention, namely discouraging abductions).

⁴⁸ See, e.g., *Re C.*, [2004] EWHC (Fam) 1245 [¶ 3] (Eng.) [INCADAT cite: HC/E/UKe 596]; see also *A.C. v. P.C.*, HKMP 1238 (High Court of Hong Kong, June 14, 2004) (China) [INCADAT cite: HC/E/CNh 825] (where a boy and his young sister were abducted from Australia and taken to Hong Kong by the father. The children were not discovered for sixteen months, and the court found the children well-settled).

⁴⁹ *Re C.*, [2004] EWHC (Fam) 1245 [¶ 3] (Eng.) [INCADAT cite: HC/E/UKe 596].

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See e.g. *J.E.A. v. C.L.M.* (2002), 220 D.L.R. 4th 577 ¶ 55, 61-62 (Can. N.S. C.A.).

⁵³ SCHUZ, A CRITICAL ANALYSIS, *supra* note 12 at 37.

⁵⁴ *Id.*

wrongful removal or retention claim, and shall not consider the merits of underlying disputes, which should be resolved in the court of the country of the child’s habitual residence immediately preceding the abduction.⁵⁵ The court is not permitted to make determinations based on who the better parent is, as doing so would frustrate the purpose of the Convention—to preserve the status quo and deter parents from abducting their children to another country to obtain a more favorable outcome.⁵⁶ Accordingly, issues such as spousal abuse, criminal proceedings, and custody are not to be determined in Hague Convention court cases.⁵⁷ However, since Contracting States have discretion when interpreting the Convention, courts sometimes consider underlying disputes to find a child well-settled, even though these considerations clearly contradict the purpose of the treaty.⁵⁸

D. Statutes of Limitations and Tolling

Statutes of limitations are used in many countries,⁵⁹ and restrict the time in which an action can be brought or rights can be enforced in court.⁶⁰ Statutes of limitations are generally enacted to protect people against “claims made after disputes have become stale, evidence has been lost, memories have faded, or witnesses have disappeared.”⁶¹ Statutes of limitations exist for a broad range of issues,⁶² and limitation periods can run from one to 30 years.⁶³ Statutes of

⁵⁵ Hague Convention art. 16, 19; Perez-Vera Report, *supra* note 21 at 427; Garcia, *Unsettling Effects*, *supra* note 5 at 474.

⁵⁶ Perez-Vera Report, *supra* note 21 at ¶ 34.

⁵⁷ In re RVB, No. 13-CV-4354, 2014 WL 3058250 (E.D.N.Y. 2014).

⁵⁸ See, e.g., Q. Petitioner [2001] SLT 243 (Scot.) [INCADAT cite: HC/E/UKs 341] (where the child was not returned, even though allegations of abuse may be untrue and the country of habitual residence would be able to provide adequate protection); Hague Convention art.17.

⁵⁹ See *Timed Out: Statutes of Limitations and Prosecuting Corruption in EU Countries*, TRANSPARENCY INTERNATIONAL – THE GLOBAL COALITION AGAINST CORRUPTION, http://archive.transparency.org/regional_pages/europe_central_asia/projects_and_activities/statutes_limitations (last visited Dec. 31, 2014). Statutes of limitations were first utilized in early Roman law and are currently used in England, the United States, Germany, India and many other European countries. *Id.*

⁶⁰ See BLACK’S LAW DICTIONARY, *infra* note 66.

⁶¹ CALVIN W. CORMAN, LIMITATIONS OF ACTIONS I 4 (1991) [hereinafter CORMAN, LIMITATIONS OF ACTIONS I].

⁶² Statutes of limitations are used for rape, breach of contract, damage to personal property, and personal injury, among many others. See, e.g., STATUTES OF LIMITATIONS FOR SEXUAL ASSAULT, THE NATIONAL CENTER FOR VICTIMS OF CRIME, <http://victimsofcrime.org/docs/DNA%20Resource%20Center/sol-for-sexual-assault-check->

limitations also encourage plaintiffs not to neglect valid claims, and to make claims in a timely manner.⁶⁴

The doctrine of equitable tolling “suspends or extends a statute of limitations as necessary to ensure fundamental practicality and fairness”⁶⁵ when a plaintiff, despite diligent efforts, did not discover the injury until after the limitations period has expired.”⁶⁶ Equitable tolling is derived from the rule of equity,⁶⁷ which denotes “the spirit and habit of fairness, justness, and right dealing between men.”⁶⁸ Fraud is also a common a reason why courts will toll a statute of limitations.⁶⁹

Although equitable tolling is a concept uniquely familiar to the common law countries (e.g. Great Britain, Ireland, Canada, New Zealand, Australia),⁷⁰ tolling need not be equitable, and may be expressly written into law.⁷¹ Codification of tolling regimes can be especially helpful in civil law countries (e.g. Switzerland, Germany, France, Italy and many Central and South American countries), which rely on expressly written laws and statutes to make legal determinations,⁷² suggesting that an express tolling regime could be easily applied in civil law countries. The mere fact that the U.S. Supreme Court rejected equitable tolling in the *Lozano* case does not mean that the Convention itself must also, as members of the Convention can

chart---final---copy.pdf?sfvrsn=2 (last visited Dec. 11, 2014); see, e.g., SACRAMENTO COUNTY PUBLIC LAW LIBRARY, STATUTE OF LIMITATIONS, <http://www.saclaw.org/pages/statutes-limitation.aspx> (last visited Dec. 11, 2014); see, e.g., Ina Brock & Sebastian Polly, *Recent Judgment by European Court of Human Rights Challenges Existing Statutes of Limitation in Asbestos-Related Case* (June 30, 2013), available at <http://www.lexology.com/library/detail.aspx?g=1f7f8bc3-b596-42e2-8bbd-adfd7d30cca6>.

⁶³ See, e.g., STATUTES OF LIMITATIONS FOR SEXUAL ASSAULT, THE NATIONAL CENTER FOR VICTIMS OF CRIME, <http://victimsofcrime.org/docs/DNA%20Resource%20Center/sol-for-sexual-assault-check-chart---final---copy.pdf?sfvrsn=2> (last visited Dec. 11, 2014).

⁶⁴ CORMAN, LIMITATIONS OF ACTIONS I, *supra* note 61 at 13.

⁶⁵ *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 194 P.3d 1026, 1031 (2008).

⁶⁶ See BLACK’S LAW DICTIONARY (6th ed. 2000).

⁶⁷ *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946).

⁶⁸ BLACK’S LAW DICTIONARY, *supra* note 66.

⁶⁹ CORMAN, LIMITATIONS OF ACTIONS II 74 (1991) [hereinafter CORMAN, LIMITATIONS OF ACTIONS II].

⁷⁰ See Part II(C) of this Note, discussing the common law countries employing equitable tolling.

⁷¹ CORMAN, LIMITATIONS OF ACTIONS II, *supra* note 69 at 2.

⁷² THE COMMON LAW AND CIVIL LAW TRADITIONS, UNIVERSITY OF CALIFORNIA AT BERKELEY SCHOOL OF LAW, <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html> (last visited Mar. 1, 2015).

decide to use a tolling regime if they so wished.

E. Equitable Tolling and Hague Convention Case Law

Although the U.S. Supreme Court is the only court of last resort that has considered equitable tolling under the Convention, several lower courts of other countries have considered the question, with extremely mixed results.⁷³

i. Strict Interpretation of the Treaty

Some courts, like in *Lozano v. Montoya Alvarez*, refuse to apply equitable tolling because the concept is not expressly written into the Convention. For instance, in *A v. B*, an Israeli court did not recognize equitable tolling as permissible under the Convention, even though the left-behind parent could not locate the child for two years, so the child was considered well-settled and was not returned.⁷⁴ In *H.J. v. Secretary for Justice*, a mother abducted her children from Australia and took them to New Zealand.⁷⁵ When their father located them over a year later, the Court refused to consider tolling, and found the children well-settled, even though the mother purposely concealed them.⁷⁶

ii. Obvious Application of Equitable Tolling

Before *Lozano v. Montoya Alvarez* was decided, many U.S. courts applied equitable

⁷³ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, INCADAT, CASE LAW ANALYSIS, <http://www.incadat.com/index.cfm?act=search.detail&cid=125&lng=l&sl=2> (last visited Jan. 4, 2015). See footnote 27 of this Note for case law explaining the mixed results found in various courts. The opinions of all Contracting States are given considerable weight when interpreting the Convention. Garcia, *Unsettling Effects*, *supra* note 5 at 478; *Abbot v. Abbot*, 130 S. Ct. 1983, 1993 (2010).

⁷⁴ CA 5690/10 A v. B (Family Matters) [2010] (Isr.) [INCADAT cite: HC/E/IL 1290]; *see also* *Lozano v. Montoya Alvarez*, 572 U.S. ___, slip op. at 6 (2014) (where the Court did not consider equitable tolling permissible under the Convention).

⁷⁵ *H.J. v. Secretary for Justice* [2006] NZ FLR 1005 (N.Z.) [INCADAT cite: HC/E/NZ 1127].

⁷⁶ *Id.*; *see, e.g.*, *Re C.*, [2004] EWHC (Fam) 1245 [¶ 3] (Eng.) [INCADAT cite: HC/E/UKe 596]; *see also* *A.C. v. P.C.*, HKMP 1238 (High Court of Hong Kong, June 14, 2004) (China) [INCADAT cite: HC/E/CNh 825] (where a boy and his young sister were abducted from Australia and taken to Hong Kong by the father. The children were not discovered for sixteen months, and the court found the children well-settled).

tolling in the case of purposeful concealment of a child.⁷⁷ These courts held that the one-year limitation period for immediate return should be tolled,⁷⁸ because otherwise, a parent is rewarded for his misconduct when he abducts and conceals his child for over a year, “creating an affirmative defense not otherwise available.”⁷⁹ For instance, in *Furnes v. Reeves*, a mother took her child from Norway to the United States for a visit, but never returned as agreed.⁸⁰ The father was unable to locate the mother or daughter for over thirteen months, however, the 11th Circuit employed the doctrine of equitable tolling, so the one-year limitation period began from the date the daughter was located, making immediate return mandatory, and the well-settled exception unavailable.⁸¹

iii. Discreet Application of Equitable Tolling

Many courts in Contracting States have not formally adopted equitable tolling, yet they nevertheless allow for the return of an abducted child when a parent has purposely concealed the whereabouts of the child for over a year and a well-settled defense is raised, effectively applying the doctrine.⁸² For instance, in *J.E.A. v. C.L.M.*, a Canadian court held that although a petition was filed seven years after a girl’s abduction by her mother, the child must be returned to her original State of residence.⁸³ The court reached this decision despite the fact that the child was doing well in school, was involved in various activities, had many friends,

⁷⁷ See *Lozano v. Montoya-Alvarez*, 697 F.3d 41, 55 (2d Cir. 2012); *Dietz v. Dietz*, 349 Fed.Appx. 930, 932-33 (5th Cir. 2009); *Duarte v. Bardales*, 526 F.3d 563, 569-70 (9th Cir. 2008); *Furnes v. Reeves*, 362 F.3d 702, 723-24 (11th Cir. 2004).

⁷⁸ See *Lozano v. Montoya-Alvarez*, 697 F.3d 41, 55 (2d Cir. 2012); *Dietz v. Dietz*, 349 Fed.Appx. 930, 932-33 (5th Cir. 2009); *Duarte v. Bardales*, 526 F.3d 563, 569-70 (9th Cir. 2008); *Furnes v. Reeves*, 362 F.3d 702, 723-24 (11th Cir. 2004).

⁷⁹ *Furnes v. Reeves*, 362 F.3d 702, 723-24 (11th Cir. 2004).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See *Cannon v. Cannon*, [2004] EWCA (civ) 1330 [¶8], [2005] 1 FLR 169 (Eng.); HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, INCADAT, CASE LAW ANALYSIS, <http://www.incadat.com/index.cfm?act=analysis.show&sl=3&lng=1> (last visited Jan. 4, 2015).

⁸³ *J.E.A. v. C.L.M.* (2002), 220 D.L.R. 4th 577, ¶ 62 (Can. N.S. C.A.).

and was generally well-settled.⁸⁴ The court noted that it was comforted by the fact that the mother was not rewarded for her deliberate deceit and lack of respect for the law,⁸⁵ which suggests an application of the general principle of equitable tolling. Courts such as this one apply equitable tolling indirectly because holding otherwise would undermine the main purpose of the Convention: to discourage international child abduction.⁸⁶

III. TOLLING THE ONE-YEAR PERIOD WOULD PRESERVE THE PURPOSE OF THE CONVENTION AND PREVENT FURTHER HARM TO ABDUCTED CHILDREN

Since no clear standard has surfaced, the Convention members should decide to toll the one-year limitation for various important policy reasons. First, the results of cases where tolling is not implemented are not consistent with the stated purpose of the Convention, namely, to deter abduction and ensure prompt return.⁸⁷ Second, tolling is in the best interests of the child because it will protect children from the trauma and lasting psychological damage caused by abduction.⁸⁸ Third, not applying tolling is unfair to children because it encourages parents to abduct and hide their children, thwarting the left-behind parent's ability to file a timely petition. Lastly, not applying tolling penalizes the children of poor and under-resourced parents.

A. Tolling Preserves the Stated Purpose of the Convention

The fundamental objectives stated in the preamble of the Convention are to deter international child abduction,⁸⁹ ensure the prompt return of abducted children, and “ensure

⁸⁴ *Id.* at ¶ 55, 61-62.

⁸⁵ *Id.* at ¶ 73.

⁸⁶ *See e.g.* Amicus Brief, A Child is Missing, *supra* note 113, at 12; *see also* Vigreux v. Michel, [2006] EWCA (Civ) 630, [2006] 2 FLR 1180 (Eng.) (where the court discreetly applied equitable tolling when it ordered a fifteen year-old boy returned to his left-behind parent, despite his objections, because delays in scheduling the case caused the child's settlement, holding that it would be unfair not to return the child under those circumstances).

⁸⁷ Hague Convention art. 1.

⁸⁸ Geoffrey L. Grief, *Impact of Family Abduction*, Presentation for National Organization for Forensic Social Workers, University of Maryland (April 16, 2012).

⁸⁹ Amicus Brief, A Child is Missing, *supra* note 113 at 12.

that the rights of custody and access under the law of one contracting state are effectively respected in other contracting states.”⁹⁰ Disallowing tolling creates the perverse effect of encouraging parents to take their kidnapped children to another country and conceal their whereabouts in the hope of later persuading the court that the child is well-settled,⁹¹ which is undoubtedly *not* the purpose of the Convention. The Convention as currently interpreted creates a loophole which subverts the purpose of deterring abduction.⁹²

The one-year limitation was enacted to deter parents from waiting long periods of time before claiming their children, and to cause the least amount of damage to children by ensuring that they will not be uprooted from their new life years later simply because a parent suddenly decides they want their child back.⁹³ Although this purpose is important, the one-year limitation does not *always* comply with the objectives of the Convention, particularly when an abducting parent succeeds in preventing the timely commencement of proceedings due to concealment of the wrongfully removed child.⁹⁴ The stated purpose of the Convention is to prevent abductions, not to give the abducting parent an enormous advantage in the abduction of their child.⁹⁵ If a parent clearly has attempted to locate their child since abduction, this limitation does not make sense.

The Convention does not expressly state that tolling should or should not be used.⁹⁶ However, many courts refer to the Elisa Perez-Vera *Explanatory Report of the Hague Convention*,⁹⁷ which is considered the official history and commentary on the Convention

⁹⁰ Hague Convention art. 1.

⁹¹ Amicus Brief, A Child is Missing, *supra* note 113 at 12.

⁹² Linda Silberman, *Patching Up the Abduction Convention*, *supra* note 30 at 44.

⁹³ SCHUZ, A CRITICAL ANALYSIS, *supra* note 12 at 225.

⁹⁴ Amicus Brief: IAML, *supra* note 142 at 5.

⁹⁵ *Id.*

⁹⁶ *See generally*, Hague Convention (no section of the Convention expressly states anything about equitable tolling).

⁹⁷ SCHUZ, A CRITICAL ANALYSIS, *supra* note 12 at 94-95; Perez-Vera Report, *supra* note 21.

and serves as a source of background on the meaning of the provisions.⁹⁸ The report states that preliminary drafts of the Convention suggested concepts other than a one-year time limit, with no explanation as to why the one-year limit was ultimately chosen.⁹⁹ Since no objective method of determining the child's settlement was found, the Convention simply fixed an arbitrary time limit.¹⁰⁰ Drafting history also indicates that some delegates strongly felt that it should be possible to return abducted children after one year, finally compromising with the well-settled exception.¹⁰¹ Further, the well-settled exception only applies to the date proceedings are commenced, and not to legal proceedings that do not *conclude* within a year.¹⁰² All of these reasons suggest that the Convention is not *really* focused on a principled belief that a certain time frame for return of the child is important—just that the left-behind parent must take timely action.¹⁰³

If tolling is not permitted, the purposes of the Convention are severely undermined, and serve to encourage further abductions—and law-breaking through concealment—instead of deterring it.¹⁰⁴ Various cases demonstrate parents who have purposely hidden their children for a year to take advantage of the well-settled exception,¹⁰⁵ suggesting that

⁹⁸ *Blondin v. Dobois*, 189 F.3d 240, 246 n.5 (2d Cir. 1999) (using the Perez-Vera report to ascertain the intent of the drafters of the Convention). Although the Vienna Convention does not expressly allow the use of such materials when interpreting treaties, the good faith requirement in Article 31 has been invoked to allow reference of the intention of parties to the Convention. SCHUZ, A CRITICAL ANALYSIS, *supra* note 12 at 94-95. Various international courts consider this report when making determinations about the intent of the drafters of the convention. *Id.*

⁹⁹ *See generally*, Perez-Vera Report, *supra* note 21 at 431.

¹⁰⁰ SCHUZ, A CRITICAL ANALYSIS, *supra* note 12 at 237.

¹⁰¹ *Id.*

¹⁰² Amicus Brief: IAML, *supra* note 142 at 5.

¹⁰³ *Id.* at 5-6.

¹⁰⁴ *Id.* at 5.

¹⁰⁵ *See e.g.*, *Lozano III*, 572 U.S. ___, slip op. at 4 (2014); *Re C.*, [2004] EWHC (Fam) 1245 [¶ 3] (Eng.) [INCADAT cite: HC/E/UKe 596]; *see also* *A.C. v. P.C.*, HKMP 1238 (High Court of Hong Kong, June 14, 2004) (China) [INCADAT cite: HC/E/CNh 825] (where a boy and his young sister were abducted from Australia and taken to Hong Kong by the father. The children were not discovered for sixteen months, and the court found the children well-settled).

this limitation is empowering lawbreakers.¹⁰⁶ The one-year period severely limits the left-behind parent's chances of succeeding in a petition for return and serves as a de facto statute of limitations,¹⁰⁷ as the failure to toll this period is often outcome determinative.¹⁰⁸ Clarifying the Convention avoids courts declining to apply tolling where it is clearly appropriate, or applying it circuitously.¹⁰⁹

B. Tolling Will Prevent Harm and Emotional Damage to Abducted Children

Family abduction is the most prevalent form of child abduction, and is an illegal act with lasting negative consequences on the abducted child.¹¹⁰ In most cases, children are not abducted for the good of the child, but for the parent's own desires.¹¹¹ When a parent abducts their child, they treat their child not as a person, but as a piece of property.¹¹² Abducted children are deprived of the love and affection of their left-behind parent and family, and are "forced into a new way of life far from home by the unlawful actions of their abducting parent."¹¹³ A serious misconception is the general perception that "children are not at risk of harm if they are in the physical custody of a parent, even if the parent is an

¹⁰⁶ One such example is *A.C. v. P.C.*, where a father took his son and young daughter from their home in Australia and brought them to Hong Kong, where he purposely hid them for sixteen months. *A.C. v. P.C.*, HKMP 1238 (High Court of Hong Kong, June 14, 2004) (China) [INCADAT cite: HC/E/CNh 825]. Because the one-year limitation period had elapsed, when the case went to court, the judge found the children well-settled, making the father's fraud successful, as he was permitted to keep his wrongly abducted children indefinitely. *Id.*

¹⁰⁷ Amicus Brief: IAML, *supra* note 142 at 7.

¹⁰⁸ Amicus Brief: IAML, *supra* note 142 at 8.

¹⁰⁹ See, e.g., *Vigreux v. Michel*, [2006] EWCA (Civ) 630, [2006] 2 FLR 1180 (Eng.); *J.E.A. v. C.L.M.* (2002), 220 D.L.R. 4th 577 (Can. N.S. C.A.).

¹¹⁰ Letter from the Office of the Attorney General, Eric H. Holder, Jr. in THE CRIME OF FAMILY ABDUCTION, *infra* note 115; PARENTAL CHILD ABDUCTION, MISSING KIDS CANADA, https://missingkids.ca/app/en/parental_child_abduction (last visited Dec. 7, 2014).

¹¹¹ K.J. Mulling, *Expert: Parental Abduction Never in Child's Best Interest*, Interview with Terry Smith of Child Find Ontario, DIGITAL JOURNAL (Sept. 3, 2010), <http://www.digitaljournal.com/article/279709> [hereinafter, Mulling, *Parental Abduction*].

¹¹² THE CRIME OF FAMILY ABDUCTION, *infra* note 115 at 4.

¹¹³ Amicus Curiae of A Child is Missing, *Lozano v. Montoya Alvarez*, Sept. 26, 2013, at 13 [hereinafter, Amicus Brief, *A Child is Missing*].

abductor.”¹¹⁴ However, abducting one’s own child is a crime, even though it is not taken as seriously as other forms of abduction.¹¹⁵

The idea that a child is well-settled after a year and therefore should not be returned, simply does not hold water, as adults that were abducted as children report that the abduction changed their lives negatively, no matter how long or short the abduction time.¹¹⁶ Parental kidnapping is a form of child abuse, of which “abducted children suffer emotionally and sometimes physically at the hands of their abducting parents.”¹¹⁷ Children are taken from everything they know and love and are often told that their left-behind parent is dead or no longer loves them.¹¹⁸ Abducted children often suffer from: feeling alone, isolated, betrayed, at fault, a loss of community and stability, anger, helplessness, fear of abandonment, and disorders ranging from eating disorders to obsessive-compulsive disorders.¹¹⁹ Because of the need to maintain secrecy, abducted children often fail to receive adequate education and healthcare, live in substandard housing, and become fearful of law enforcement and leaving home.¹²⁰

Although some scholars claim that tolling the one-year period places the rights of the left-behind parent above the interests of the abducted child in maintaining stability in his or her new environment,¹²¹ current evidence indicates that children who are returned, even

¹¹⁴ *Psychological Impact of Abduction*, U.S. DEPARTMENT OF JUSTICE PROGRAM, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, available at <https://www.ncjrs.gov/html/ojdp/190074/page6.html>.

¹¹⁵ Mulling, *Parental Abduction*, *supra* note 111; THE CRIME OF FAMILY ABDUCTION: A CHILD’S AND PARENT’S PERSPECTIVE 1, U.S. DEPARTMENT OF JUSTICE (2010) [hereinafter THE CRIME OF FAMILY ABDUCTION].

¹¹⁶ See THE CRIME OF FAMILY ABDUCTION, *supra* note 115 at 7 (interviewing various adults, children and parents and gaining their backward looking perspective of their experience with parental abduction and the painful after effects).

¹¹⁷ Nancy Faulkner, *The Impact of Parental Child Abduction* (quoting Patricia Hoff), *supra* note 13.

¹¹⁸ *Id.*; THE CRIME OF FAMILY ABDUCTION, *supra* note 115 at 3.

¹¹⁹ Mulling, *Parental Abduction*, *supra* note 111; see THE CRIME OF FAMILY ABDUCTION, *supra* note 115 at 7.

¹²⁰ THE HARMFUL EFFECTS OF PARENTAL ABDUCTION IN CHILD CUSTODY CASES, WASHINGTON COURTS, available at <http://www.courts.wa.gov/newsinfo/content/pdf/harmfuleffectsofparentalabduction.pdf> (last visited Dec. 4, 2014).

¹²¹ Fontaine, *Don’t Stop the Clock*, *supra* note 24 at 2091, 2094.

after many years, can and do thrive when brought back to their left-behind life and parent.¹²² This is true even when the abducting parent turns the child against the left-behind parent by telling lies, brainwashing, and manipulating the child with gifts and twisted versions of the truth.¹²³

In reality, tolling the one-year period does not put the left-behind parent's rights above the child; it actually places the child's needs and the law first. Children of long-term abductions report a feeling of resentment toward *both* parents, the abducting parent for stealing them, and the left-behind parent for not rescuing them *sooner*.¹²⁴ And the longer a child is on the run, the more emotional damage is done.¹²⁵ As adults, victims of child abduction still long to be reunited with their lost parent.¹²⁶ Abducted children have a high rate of seeking out their left-behind parent as teenagers and adults, always seeking reunification, even after many years apart.¹²⁷ This suggests that returning a child to a left-behind parent, even after many years, is often what is best for the child and is what the child desires.

In fact, children that are abducted for over six months display severe psychological trauma and severe social disorders that will likely not be resolved as long as the child stays with his or her abductor.¹²⁸ Although reintegration with family after many years can be difficult for the child, this is often the only chance the child will have to overcome the

¹²² Mulling, *Parental Abduction*, *supra* note 111.

¹²³ THE CRIME OF FAMILY ABDUCTION, *supra* note 115 at 4; *see also* Richard A. Gardner, M.D., *The Parental Alienation Syndrome* 73 (2d ed. 1998) (explaining the procedures parent uses to alienate a child from a target parent).

¹²⁴ Marilyn Freeman, *Effects and Consequences of International Child Abduction*, 32 *FAM. L. Q.* 603, 608 (1998) (emphasis added) [hereinafter Freeman, *Effects and Consequences*].

¹²⁵ Mulling, *Parental Abduction*, *supra* note 111.

¹²⁶ Nancy Faulkner, *The Impact of Parental Child Abduction* (quoting Patricia Hoff), *supra* note 13.

¹²⁷ Marilyn Freeman, *Parental Abductions: The Long-Term Effects*, INT'L CTR. FOR FAMILY L. POL'Y & PRACTICE, available at <http://www.famlawandpractice.com/longtermeffects.pdf> (Dec. 5, 2014) [hereinafter Freeman, *Parental Abductions: The Long-Term Effects*].

¹²⁸ *Id.* at 609-10.

issues caused by the abduction.¹²⁹ Most children are found to improve with the stability of being home with the searching parent and attending therapy.¹³⁰

Given the adverse effects of parental abduction, more must be done to prevent abductions from taking place in the first place.¹³¹ Although those who argue against tolling believe it undermines the child's need for stability by uprooting them once again,¹³² this argument ultimately fails, as not permitting tolling incentivizes parents to steal their children and hide them for a year, creating a situation where more children will be abducted.¹³³ Although some parents may attempt to hide a child for longer than one year if tolling is implemented, it is likely that most parents will be deterred by the prospect of hiding for a longer period of time.¹³⁴

C. Tolling Discourages Abduction, Discourages Hiding Abducted Children. And Discourages a Parent from Thwarting a Left-Behind Parent's Ability to File a Timely Petition

Abducting parents who conceal the whereabouts of their children to delay the commencement of proceedings should not be permitted to benefit from their misconduct¹³⁵ by being allowed to keep their children. If the one-year limitation is not subject to tolling, it incentivizes abducting parents to conceal the whereabouts of their children for as long as possible, because the longer it takes a left-behind parent to find their child, the higher the

¹²⁹ See generally, Marilyn Freeman, *Effects and Consequences*, supra note 124 at 608 n. 22. Many experts feel that young children under three years old may not suffer as much from an abduction because they are not as aware of what is happening. *Id.* at 608 n. 22. Many experts feel that young children under three years old may not suffer as much from an abduction because they are not as aware of what is happening. *Id.* This suggests that even if a few years have passed, the return of an infant who is now two years old may cause very little negative psychological impact on the child. *Id.* However, if a child is abducted at the age of two or three, case studies have shown that they are completely aware of the situation and will likely suffer psychological consequences, making return, even if after one year, desirable. *Id.* at 608 n. 22, 614.

¹³⁰ See Freeman, *Effects and Consequences*, supra note 124 at 614.

¹³¹ Marilyn Freeman, *Parental Abductions: The Long-Term Effects*, supra note 127 at 31, 37, 39.

¹³² Merle H. Weiner, *Uprooting Children in the Name of Equity*, 33 *FORDHAM INT'L L.J.* 409, 410 (2009-2010).

¹³³ See Part III(C) of this Note.

¹³⁴ See Part V of this Note.

¹³⁵ See Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 *Fed. Reg.* 10,494, 10,509 (Mar. 26, 1986).

chances that the court will consider the child well-settled.¹³⁶ Time is on the side of the abducting parent, and it is extremely rare for a court to order the return of a child despite a well-settled finding,¹³⁷ even though courts have the discretion to do so.¹³⁸

Though requirements vary considerably between Contracting States,¹³⁹ proceedings generally cannot commence until the child has been located.¹⁴⁰ However, in twenty-six of the ninety-four Contracting States, a left-behind parent does not have to know the child's whereabouts in order to commence proceedings, creating a significant inconsistency in the application of the Convention.¹⁴¹ Further, the Convention does not define what constitutes the "commencement" of proceedings, leaving it to the interpretation of the courts in each Contracting State.¹⁴² This means that in some states, commencement is when an petition has been submitted (whether complete or incomplete), while others deem commencement to be when judicial proceedings are filed.¹⁴³ This creates a situation where countries that do not permit the commencement of proceedings until the child is located become destination choices for kidnappers.¹⁴⁴

D. The One-Year Limitation Period Penalizes the Children of Poor and Under-Resourced Left-Behind Parents

The Convention's one-year limitation unfairly disadvantages children of poor and

¹³⁶ Amicus Brief, A Child is Missing, *supra* note 113 at 11.

¹³⁷ Amicus Brief, A Child is Missing, *supra* note 113 at 17 n. 10; Brady, *The Hague Convention*, *supra* note 21 at 26. Courts have the discretion to order return despite a well-settled finding. *See, e.g.*, J.E.A. v. C.L.M. (2002), 220 D.L.R. 4th 577, ¶ 55, 61-62 (Can. N.S. C.A.).

¹³⁸ Brady, *The Hague Convention*, *supra* note 21 at 187.

¹³⁹ *See* Part II(B) of this Note.

¹⁴⁰ SCHUZ, A CRITICAL ANALYSIS, *supra* note 12 at 43.

¹⁴¹ Amicus Brief, A Child is Missing, *supra* note 113 at 30; Australia, the Bahamas, Belgium, Bermuda, Brazil, Burkina Faso, Costa Rica, Croatia, the Dominican Republic, El Salvador, France, Greece, Guatemala, Honduras, Hong Kong Special Admin. Region, Italy, Morocco, Panama, Portugal, Romania, St. Kitts and Nevis, South Africa, Spain, Sri Lanka, Turkey, and Venezuela do not require the left-behind parent to know the whereabouts of the abducted child to begin a proceeding. *Id.*

¹⁴² Amicus Curiae of The International Academy of Matrimonial Lawyers, *Lozano v. Montoya Alvarez*, 2013, at 3-4 [hereinafter "Amicus Brief: IAML"].

¹⁴³ Amicus Brief, A Child is Missing, *supra* note 113 at 30.

¹⁴⁴ Amicus Brief, A Child is Missing, *supra* note 113 at 34.

under-resourced parents when the abducting parent purposely hides their abducted child and takes or destroys documents needed to file a petition or begin proceedings.

i. Cost and Time to Locate an Abducted Child

Locating an internationally abducted child can take considerable amounts of time and money, which can make proceedings within one year impossible. Left-behind parents can spend up to \$40,000 on private investigators to locate their abducted children.¹⁴⁵ More than one-half of parents report spending as much as, or more than, their annual income to locate their child.¹⁴⁶ Median legal costs are often over \$15,000, and travel costs are often over \$3,250.¹⁴⁷ This means that overall, it can cost a left behind parent between \$10,000 and \$270,000 to find their child.¹⁴⁸ Therefore, locating an abducted child within one year is cost prohibitive for people of ordinary means, creating an unfair situation for children abducted from a parent without money or resources.

ii. Problems with Laws, Agencies and Policies

In the United States, left-behind parents report high levels of dissatisfaction with law enforcement's initial response to parents' reports of abductions,¹⁴⁹ and the criminal justice system pays "relatively scant attention to the crime of parental abduction."¹⁵⁰ Two-thirds of parents report that they received little or no assistance from the first law enforcement official they spoke with,¹⁵¹ and more than two-thirds of left-behind parents encountered individuals and

¹⁴⁵ Janet Chiancone, et al., *Issues in Resolving Cases of International Child Abduction by Parents* 7, U.S. DEPT. OF JUSTICE, JUVENILE BULLETIN (2001), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf> [hereinafter Chiancone, *Issues in Resolving International Child Abduction*].

¹⁴⁶ *Id.* at 6.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Kathi Grasso, et. al., *The Criminal Justice System's Response to Parental Abduction* 7, U.S. DEPARTMENT OF JUSTICE, JUVENILE BULLETIN (2001), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/186160.pdf>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*; NEWSLETTER, FEBRUARY 2013: CHILD ABDUCTION: THE ROAD TO RECOVERY – A REAL LIFE STORY OF PARENTAL ABDUCTION, MISSING AND EXPLOITED CHILDREN'S PROGRAM, <http://mecptraining.org/february-2013-child-abduction-the-road-to-recovery/> (last visited March 9, 2015).

organizations that regarded parental abduction as a family problem that did not require legal intervention.¹⁵² These delayed responses by law enforcement agencies contribute to successful parental abductions.¹⁵³

Left-behind parents also report difficulties working with foreign officials of other countries to locate their abducted children,¹⁵⁴ and report language barriers and a lack of concern on the part of agency personnel and officials.¹⁵⁵ Working with the foreign government may be impossible if a parent had children with a prominent citizen from the foreign country.¹⁵⁶ In some cases, the obstacle is the foreign laws themselves and not the officials or agencies.¹⁵⁷ Merely because a country is a party to the Hague Convention does not mean the country effectively enforces its treaty obligations. Many countries are non-compliant with the terms of the Convention, which makes locating an abducted child even more difficult.¹⁵⁸ For example, Mexico has not enacted legislation to implement the Convention, and Mexican law enforcement agencies make no serious effort to locate parentally abducted children, so if a child cannot be located, nothing happens.¹⁵⁹ Similar problems exist in Argentina, Brazil, The Bahamas, Guatemala, Honduras, Peru, Turkey, and several other countries.¹⁶⁰

¹⁵² Chiancone, *Issues in Resolving International Child Abduction*, *supra* note 145 at 6.

¹⁵³ *Id.* at 8.

¹⁵⁴ *Id.* at 7.

¹⁵⁵ *Id.* at 6.

¹⁵⁶ *Id.* at 7.

¹⁵⁷ *Id.*

¹⁵⁸ U.S. DEPT. OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 3 (2014), *available at* <http://travel.state.gov/content/dam/childabduction/complianceReports/2014.pdf>; Costa Rica, Guatemala and Honduras are non-compliant, The Bahamas and Brazil have patterns of non-compliance, and Mexico, Brazil, Romania and Ukraine lack enforcement mechanisms to effectively enforce the treaty. *Id.* at 3-6.

¹⁵⁹ U.S. DEPT. OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 21-41 (2014), *available at* <http://travel.state.gov/content/dam/childabduction/complianceReports/2014.pdf>.

¹⁶⁰ *Id.* at 7-51.

*iii. Cost and Time to Obtain Documents*¹⁶¹

Hague Convention petitions and court proceedings require certified and translated documents,¹⁶² so if a parent cannot obtain the necessary documents within one year, the process is incomplete, and proceedings cannot commence.¹⁶³ Abducting parents sometimes steal or destroy relevant and valuable documents that the left-behind parent needs in order to file a petition. If mandatory documents cannot be obtained within one year of abduction, a child may be considered well-settled,¹⁶⁴ and may not be returned to the left-behind parent.

For example, in Mexico, obtaining a certified document is complicated, as each state has different procedures to follow.¹⁶⁵ In Mexico City, a birth certificate costs 4,531 pesos, can be ordered on-line, and may take a few weeks to receive,¹⁶⁶ however, in other Mexican states, one must travel there person to request documents.¹⁶⁷ In Peru, one must travel to the district where the birth or marriage took place, show identification, and wait sixty days to

¹⁶¹ Instructions to parents regarding how to file a Hague Convention application and petition are found on the internet. *See, e.g.*, THE U.S. DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS: HOW TO FILE A HAGUE APPLICATION, *available at* <http://travel.state.gov/content/childabduction/english/from/hague-app.html>; THE CANADIAN EMBASSY, PARENTAL CHILD ABDUCTION, http://canada.usembassy.gov/consular_services/child-abduction.html#hague (explaining the certified documents required and that “cases will not be acted upon until the Central Authority receives all of the required documents”); THE UNITED KINGDOM, INTERNATIONAL CHILD ABDUCTION AND CONTACT UNIT APPLICATION FORM, *available at* <https://www.gov.uk/government/publications/international-child-abduction-and-contact-unit-application-form>. Instructions to a parent about how to obtain certified copies of passports, birth certificates, marriage certificates, and court documents are also found on the internet. *See, e.g.*, THE EMBASSY OF ARGENTINA, CONSULAR OFFICE, PARTIDAS DE ESTADO CIVIL, <http://embassyofargentina.us/embassyofargentina.us/es/consulares/tramites/partidas.htm> (last visited Feb. 3, 2015); IMMIGRATE TO THE US, MEXICAN BIRTH CERTIFICATES, <http://immigrate2us.net/forum/showthread.php?10713-Mexico-Birth-Certificates> (last visited Feb. 3, 2015). Parents without reading or computer skills or access to the internet are placed at a severe disadvantage.

¹⁶² For instance, the U.S. Application requires: Certified copies of marriage certificates, birth certificates of each child, divorce decrees, passports, evidence of custodial right, relevant court documents, photographs of the taking parent and child, translations of all of the above documents into the language of the receiving country, as well as any additional documents required by the receiving country. U.S. DEPARTMENT OF STATE, APPLICATION UNDER THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, <http://travel.state.gov/content/childabduction/english/from/hague-app/guidance.html> (last visited Nov. 10, 2014).

¹⁶³ SCHUZ, A CRITICAL ANALYSIS, *supra* note 12 at 43.

¹⁶⁴ The Hague Convention art. 12.

¹⁶⁵ *See* IMMIGRATE TO THE US, MEXICAN BIRTH CERTIFICATES, *supra* note 161.

¹⁶⁶ MEXICO, DISTRITO FEDERAL, SECRETARY OF FINANCE, http://www.finanzas.df.gob.mx/formato_lc/civil/civ_importe.php?id=59 (last visited Feb. 3, 2015).

¹⁶⁷ *See e.g.*, NUEVO LEON, MEXICO, SERVICIO: COPIA CERTIFICADA DE ACTA DE NACIMIENTO, <http://www.nl.gob.mx/servicios/copia-certificada-de-acta-de-nacimiento> (last visited Feb. 3, 2015).

obtain the needed certificate.¹⁶⁸ In Argentina, if one wishes to obtain a birth certificate, they must travel in person to the town the child was born to request the certificate, then travel to Buenos Aires to obtain a notary stamp to prove the certificate is genuine.¹⁶⁹ The document must then be taken to yet another agency to have the certificate apostilled.¹⁷⁰ It can take days or weeks to obtain appointments and travel to obtain these documents and certifications.¹⁷¹ If a parent no longer resides in the country where a certificate was generated, this process involves purchasing an airline ticket for over \$1,000, renting a vehicle, paying hotel fares, and paying certification fees.¹⁷² For many left-behind parents, this is not possible due to expense, lack of child care, or loss of work.

Additionally, if a child is abducted to a country that speaks a different language than the left-behind country, the documents must be translated into the language of the country the child was abducted to.¹⁷³ It can cost as much as \$300 to obtain a certified translation of just one birth certificate,¹⁷⁴ so getting an entire petition translated can cost thousands of dollars.¹⁷⁵ These expenses are not affordable for people of modest means, especially within one year.

¹⁶⁸ REPUBLIC OF PERU, NATIONAL REGISTRY OF IDENTIFICATION AND CIVIL STATUS, <http://www.reniec.gob.pe/portal/registroCivil.htm#> (last visited Feb. 2, 2015).

¹⁶⁹ Interview with Dr. Javier Donatelli, Argentine Citizen (Jan. 28, 2015) (discussing his experience obtaining his birth certificate and having it translated into English in the United States).

¹⁷⁰ Interview with Dr. Javier Donatelli, *supra* note 169; THE EMBASSY OF ARGENTINA, CONSULAR OFFICE, PARTIDAS DE ESTADO CIVIL, *supra* note 161.

¹⁷¹ Interview with Dr. Javier Donatelli, *supra* note 169; Cost of the certificates themselves is nominal—about twenty-eight pesos. *Id.*

¹⁷² *Id.*

¹⁷³ THE U.S. DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS: HOW TO FILE A HAGUE APPLICATION, available at <http://travel.state.gov/content/childabduction/english/from/hague-app.html>.

¹⁷⁴ Interview with Dr. Javier Donatelli, *supra* note 169.

¹⁷⁵ See generally, THE US CERTIFIED TRANSLATION SERVICE, <http://www.uscts.com> (last visited Dec. 11, 2014) (where translations of various documents from many countries can be translated); REV, <http://www.rev.com/translation/certified-legal> (last visited April 28, 2016) (legal documents translate for \$33 a page, making a 50 page document cost over \$1,650).

IV. THE HAGUE CONVENTION SHOULD EXPRESSLY ALLOW TOLLING TO PREVENT ABDUCTIONS AND HARM TO CHILDREN

The Hague Convention should make an interpretive policy statement allowing tolling if an abducted child was purposely hidden for over one year.¹⁷⁶ A clear interpretation of the one-year limitation would ensure that abducted children do not suffer merely because a left-behind parent cannot locate their child, especially when the child was hidden solely for the purpose of circumventing the law.¹⁷⁷

In the United States alone, 37% of children abducted by a family member are still not recovered after one year.¹⁷⁸ Countries like Mexico are destination countries for children abducted from the United States,¹⁷⁹ likely because abductions in Mexico largely remain unresolved after eighteen months.¹⁸⁰ However, most abducted children are found within five years of abduction,¹⁸¹ suggesting that a one-year limitation is simply unreasonable.

¹⁷⁶ The Hague Convention may be amended if the amendment is proposed during a plenary or emergency meeting of the Hague Conference on Private International Law. THE HAGUE CONVENTION, RULES OF PROCEDURE, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *available at* http://www.hcch.net/index_en.php?act=publications.details&pid=5263&dtid=51 (last visited Dec. 11, 2014). Amendments to the Convention can be made by a consensus or majority vote of the Contracting States present at a meeting concerning the general affairs and policy at the time of the vote. *Id.* art. 1-3. Generally, the Hague Conference on Private International Law meets every four years, with the last session meeting in 2007. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, MORE ABOUT HCCH, http://www.hcch.net/index_en.php?act=text.display&tid=4 (last visited Jan. 1, 2014). The last meeting of the Abduction Convention Special Commission met in 2011. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, SPECIAL COMMISSION MEETINGS, http://www.hcch.net/index_en.php?act=conventions.publications&dtid=57&cid=24 (last visited Jan. 8, 2014). Under the Vienna Convention on the Law of Treaties, the Hague Convention can be amended so long as all parties are notified and have the right to take part in the decision. Vienna Convention on the Law of Treaties art. 40, May 23, 1969, 1155 U.N.T.S. 331.

¹⁷⁷ The Hague Convention could also be amended to allow tolling when parents do not have the financial resources to pursue a claim or acquire the required documents within one year.

¹⁷⁸ MISSING CHILD STATISTICS, THE POLLY KLAAS FOUNDATION, <http://www.pollyklaas.org/about/casemanagement.html> (last visited Mar. 9, 2015).

¹⁷⁹ *A Parent's Worst Nightmare*: Hearing Before the Comm. on International Relations House of Representatives, 108th Cong., 2d Session (2004), (Statement of Maura Harty, Assistant Secretary, Bureau of Consular Affairs, U.S. Department of State) *available at*, http://commdocs.house.gov/committees/intlrel/hfa94505.000/hfa94505_0f.htm.

¹⁸⁰ *Id.*

¹⁸¹ *See C. v. C.* [2008] CSOH 42, 2008 S.C.L.R. 329 (Scot.) [INCADAT cite: HC/E/UKs 962] (2 ½ years elapsed); Justice de Paix du cercle de Lausanne [Magistrate's Court] July 6, 2000, J 765 CIEV 112E (Switz.) (INCADAT cite: HC/E/CH 434) (4 years elapsed); *Lops v. Lops*, 140 F.3d 927, 927 (11th Cir. 1998) (2 ½ years elapsed); *In re Coffield*, 96 Ohio App. 3d 52, 644 N.E. 2d 662 (1994) (3 years elapsed); *Re C.*, [2004] EWHC (Fam) 1245 [¶ 3] (Eng.) [INCADAT cite: HC/E/UKe 596] (4 years elapsed); *A.C. v. P.C.*, HKMP 1238 (High Court of Hong Kong,

Considering the interpretive problems and loopholes that have surfaced in the 35 years since the Convention was signed into action, Convention members should consider tolling the one-year limitation,¹⁸² which would provide international courts with a clear understanding of how apply the one-year limitation and well-settled exception to return. Clarity is needed regarding the application and interpretation of the well-settled defense and situations under which the exception should be used. Tolling would solve this problem by ensuring that abducting parents are not incentivized by the prospect of circumventing the law to be allowed to keep their illegally abducted children. Tolling the one-year limitation period would also help children whose parents are not of substantial means be on a level playing field with an abductor who purposely stole documents from the left-behind parent in order to thwart their ability to file a timely petition.

The specific mechanics of a possible tolling regime need to be determined. However, tolling the one-year limitation should preserve the left-behind parent's right to immediate return of their abducted child for additional time if the child cannot be located, as long as the parent can show that he or she made reasonable efforts to find his or her child and file a petition within one year. However, if a reasonable person should have or would have discovered the child within one year of abduction, then tolling should not apply.

June 14, 2004) (China) [INCADAT cite: HC/E/CNh 825] (4 ¾ years elapsed); *but see* J.E.A. v. C.L.M. (2002), 220 D.L.R. 4th 577 (Can. N.S. C.A.) (7 years elapsed).

¹⁸² Past amendments, protocols and new interpretations brought under The Hague Convention Commission have been successful, making it is probable that a new interpretation the Convention can be accepted and passed. The most recent amendment under the Hague Commission was the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, which has been touted as an important and essential convention regarding the improvement of the protection of children in international situations and avoiding conflicts between different national legal systems, and provides common rules signatory countries regarding jurisdiction, applicable law, recognition, enforcement and cooperation on matters of parental responsibility and child protection. THE AUSTRALASIAN INSTITUTE OF JUDICIAL ADMINISTRATION (AIJA), <http://www.aija.org.au/Child%20Protection%202011/Presentations/Bennett.pdf> (last visited Jan. 9, 2015).

V. CONCLUSION

Many of us cannot imagine a more terrifying nightmare than having our child taken from their home and everything they know and love. Although the Hague Convention on the Civil Aspects of International Child Abduction has been widely acclaimed, some scholars are doubtful of the extent to which the Convention's objectives of deterring abductions have been realized.¹⁸³ However, if the Convention made an interpretive statement allowing tolling, it would set an example to parents that bad-faith, illegal child stealing, and hiding a child to circumvent the law will not be tolerated, therefore resulting in less child abductions and less victimization of abducted children.¹⁸⁴

¹⁸³ SCHUZ, A CRITICAL ANALYSIS, *supra* note 12 at 1.

¹⁸⁴ Amicus Brief, A Child is Missing, *supra* note 113, at 13.